OAH 15-1800-22176-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Denial of the Application for Child Care License to Michelle Trost	**FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION**

A hearing was held on September 20, 2011, at the Scott County Government Center, 200 Fourth Avenue West, Shakopee, Minnesota, by Administrative Law Judge Beverly Jones Heydinger, pursuant to Notice and Order for Hearing dated June 22, 2011. The hearing record closed at the completion of the hearing on September 20, 2011.

Appearances: Jeanne Anderson, Assistant Scott County Attorney, on behalf of the Department of Human Services (Department) and Scott County Health and Human Services (County). Michelle Trost (Applicant) appeared on her own behalf without benefit of counsel.

STATEMENT OF THE ISSUE

Did the Department properly deny the Applicant a childcare license because she was disqualified from serving persons in programs it licenses?

The Administrative Law Judge recommends that the Department set aside the Applicant's disqualification and allow the license application process to proceed.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Applicant applied to the County for a license to provide child care. A background check was conducted and two disqualifying incidents were reported. The Applicant requested that the Department reconsider the disqualification. The County recommended that the Department grant a variance and issue a license.[1] The

[1] Exhibit (Ex.) 2.

Department did not grant the request for reconsideration or grant a variance and denied the license.[2] The Applicant appealed the disqualification and the denial of the license.[3]

Alleged Disqualifying Incident

2. On March 21, 2007, at approximately 2:00 a.m., the Applicant was involved in an altercation with her former boyfriend, D.F., at his apartment in Belle Plaine, Minnesota. At that time, the Applicant was known by her name prior to marriage, Michelle Woestehoff. She was 26 years old. The police report of the incident stated that when the police arrived, the applicant was very upset, emotional and loud and appeared intoxicated. She reported that she had been fighting with her boyfriend because he was high on methamphetamine and would not quit using it. She stated that he hit her during the fight and threw a TV at her. She could not state where she had been hit and the officers did not see any marks on her face. Photos included in the police report showed bruises on the Applicant's hand and arm. [4]

3. The police interviewed D.F. and another witness. D.F. was in his apartment and items were scattered around, including a TV, chair, CD's and knick-knacks. D.F.'s shirt was partially torn off, he was bleeding from the mouth, and he had a bite mark on his chest and blood on his shirt. He told the police that the Applicant came to his apartment at approximately 2:00 a.m., that she demanded to come in and forced her way into the apartment, hitting him, ripping his shirt and calling him names. D.F. claimed that the Applicant wanted meth, threw her meth pipe at him, which hit him in the face, that she knocked items off the TV, knocked over the chair and broke it. The other witness stated that she had been in the bedroom at the time, that she had heard the Applicant banging on the door and, once inside, yelling and screaming. The witness heard D.F. say "You bit me," but had no additional details.[5]

4. Following the interview with D.F. and the witness, the police spoke with the Applicant, who denied what D.F. had stated. She was placed under arrest and searched. In her handbag, the police found a glass pipe with white residue wrapped in a handkerchief, and a black plastic container with a clear baggie inside. The baggie contained a white powder substance, later identified by the Bureau of Criminal Apprehension as methamphetamine.[6]

5. On March 23, 2007, the Applicant was nauseous, light-headed and vomiting. She went to Urgent Care at St. Francis Hospital, where she was diagnosed with a possible concussion and bruising on the biceps, right thigh and left mid leg. Photos were taken.[7]

[2] Exs. 10, 11.
[3] Notice and Order for Hearing, Ex. A.
[4] Ex. 5.
[5] Ex. 5.
[6] Ex. 5.
[7] Exs. 12, 13.

6. Criminal charges were filed against the Applicant for possession of a controlled substance, fifth degree, a violation of Minn. Stat. § 152.025, subd. 2 (1), and fifth degree assault, a violation of Minn. Stat. § 609.224, subd. 1 (2).[8]

7. The Applicant was represented by counsel in the criminal proceedings. She agreed to enter an Alford Plea to the fifth degree drug possession charge with a Stay of Adjudication and was placed on probation for 36 months. The charge of assault was dismissed. The Applicant pled guilty to an amended charge of disorderly conduct, a violation of Minn. Stat. § 609.72 (1), a misdemeanor, and was sentenced with a Stay of Imposition, placed on probation and required to fulfill certain conditions imposed by the District Court.[9]

8. In 2008, Scott County Community Corrections filed a statement with the Scott County District Court concerning the charge of disorderly conduct, stating that the Applicant had met the terms of her probation. On December 23, 2008, the Scott County District Court discharged the Applicant from probation and fully reinstated her civil rights, right to vote and hold public office, with the exception of limitations on the right to possess a pistol or other firearm.[10]

9. In 2009, Scott County Community Corrections filed a similar statement with the District Court asserting that the Applicant had met all conditions imposed upon her by the Court for Stay of Adjudication of the fifth degree drug offense, including abstaining from drug and alcohol use, submitting to random drug testing, completing anger evaluation and any recommended counseling or aftercare, and remaining law-abiding. On December 18, 2009, the District Court issued an Order dismissing the charge for drug possession without an adjudication of guilt and discharged the Applicant from probation. The Order stated: "That the Probationer shall not be deemed to have been convicted, and he/she shall not incur any of the disqualifications or disabilities imposed by law for conviction of crime except those imposed by the Federal Gun Control Act."[11]

10. This determination was consistent with Minn. Stat. § 152.18, subd. 1, which allows a person who has been charged with his or her first drug offense to be placed on probation, subject to reasonable conditions, without entering a judgment of guilty. The statute provides:

> If during the period of probation the person does not violate any of the conditions of the probation, then upon expiration of the period the court shall discharge the person and dismiss the proceedings against that person. Discharge and dismissal under this subdivision shall be without court adjudication of guilt…. The discharge or dismissal shall not be

[8] Ex. 4. Minnesota Statutes are cited to the 2010 Edition.
[9] Exs. 7 and 8. The photos are referenced in Ex. 13 at page 6 of 7, and the corresponding number 2200 appears on Ex. 12.
[10] Ex. 9.
[11] Ex. 8.

deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime or for any other purpose.[12]

11. The Applicant believed that by completing the terms of her probation and obtaining these Orders, she was no longer subject to disqualification or other limitations related to the 2007 incident, except as specified in the Orders.[13]

Prior Notice of Disqualification

12. In 2007, the Applicant was living with her mother who was licensed by the Department to provide child care in the home. The Department was notified of the incident involving the Applicant and conducted a background check. It reviewed the matter and determined that, based on the preponderance of evidence, the Applicant should be disqualified from contact with or access to children in a licensed program because of domestic assault. At that time, the fifth degree drug charge was not a disqualifying offense and there was no review of the facts related to it.[14]

13. The Applicant requested reconsideration of this determination on September 20, 2007, but withdrew her request for a hearing on January 21, 2008. The Commissioner issued an Order of Dismissal on January 23, 2008, dismissing the 2007 request for reconsideration, and stating that the Department's disqualification would not be set aside.[15] The disqualification became final, but the Department granted a variance to allow the Applicant to continue to reside in her mother's home. The variance expired when the Applicant married and moved out of her mother's home.[16]

14. The Department granted the variance because the Applicant was living with her mother who had been a childcare provider in good standing for many years, and, although the Applicant was living in the home, she was attending school and not involved with caring for the children.[17]

Application for a Child Care License and Request for Reconsideration

15. By 2011, the fifth degree drug charge had been added to the statutory list of disqualifying offenses.[18]

16. In 2011, the Applicant attended the County's orientation for persons applying for a child care license. A background study was conducted and the County concluded that the Applicant had two disqualifying offenses. Its notice to her stated:

> An applicant background study was conducted pursuant to Minnesota Statutes, Chapter 245C. The required study indicates that you are

[12] Minn. Stat. § 152.18, subd. 1.
[13] Test. of M. Trost.
[14] Test. of Patricia Sifferle, Legal Office Supervisor, DHS Licensing Division; Ex. 2.
[15] Ex. 3.
[16] Ex. 2; Test. of Nancy Berndt, County licensing worker.
[17] Test. of P. Sifferle.
[18] Minn. Stat. § 245C.15, subd. 2.

disqualified from direct contact with, or access to, persons served by the program due to an admission (Stay of Adjudication) of drugs 5th degree charge (152.025) and a preponderance of evidence of domestic Assault (609.2242) which occurred on 03/21/2007.

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You have the right to request reconsideration of the disqualification.[19]

17. The letter from the County did not state that either of the disqualifications was conclusive or not subject to reconsideration.[20]

18. On April 20, 2011, the Applicant requested reconsideration.[21]

19. Scott County forwarded the request for reconsideration to the Department by letter dated April 26, 2011. It included its risk of harm assessment, assigning a low risk of harm. It also included a form completed by Nancy Berndt, the County licensing worker, that stated that the Applicant was found to have committed domestic assault by a preponderance of the evidence and that the Applicant had admitted to a felony-level drug offense.[22]

20. The County also submitted a letter from the Applicant describing the circumstances surrounding the incident in 2007, her decision to accept the court's disposition and the reasons for doing so, including her statement that she maintained her innocence, and her efforts to seek treatment, obtain additional education, and participate in AA/NA meetings.[23]

21. The County also submitted the court orders discharging the Applicant from probation,[24] a substance abuse evaluation stating that no treatment was recommended,[25] and treatment discharge summaries from 2005 and 2006.[26]

22. In both the County's letter to the Applicant dated April 20, 2011, and its letter to the Commissioner, dated April 26, 2011, the County mistakenly stated that the Applicant was charged with domestic assault, a violation of Minn. Stat. § 609.2242.[27]

23. The offense of "domestic abuse" requires that certain acts are committed against "a family or household member by a family of household member."[28]

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[19] Ex. 1; Test. of N. Berndt.
[20] Ex. 1.
[21] Ex. 2.
[22] Ex. 2 at 5.
[23] Ex. 2 at 7-11.
[24] Ex. 2 at 13, 15.
[25] Ex. 2 at 17, undated, rec'd by County April 25, 2011.
[26] Ex. 2 at 19-20, 21.
[27] *Compare* Exs. 1 and 2 and Ex. 4.
[28] Minn. Stat. § 518B.01, subd. 2 (a).

24. "Family or household members" means:

(1) spouses and former spouses;

(2) parents and children;

(3) persons related by blood;

(4) persons who are presently residing together or who have resided together in the past;

(5) persons who have a child in common regardless of whether they have been married or have lived together at any time;

(6) a man and woman if the woman is pregnant and the man is alleged to be the father, regardless of whether they have been married or have lived together at any time; and

(7) persons involved in a significant romantic or sexual relationship.[29]

25. There is no evidence in the record, including the police report, that the Applicant and D.F. had a relationship that met the definition of "family or household members."

26. The Department completed its own risk of harm determination. In so doing, it restated that there was a "preponderance of evidence of misdemeanor domestic assault on 3/21/07." It made no determination concerning the charged offense, fifth degree assault, or the charge of disorderly conduct, to which the Applicant pled guilty.

27. The Department erroneously relied upon a "conviction" of controlled substance crime in the fifth degree on 3/21/07 "deemed a misdemeanor on discharge on 1/5/10."[30] As reflected on Exhibit 8, there was no conviction on the drug offense. Exhibit 9 shows that the offense "deemed a misdemeanor" was the disorderly conduct charge.

28. The Department determined that the triggering incident was intentional, overt or violent, with moderate harm and damage to the victim, that the Applicant had submitted documentation of successful completion of pertinent training/rehabilitation, and that she accepted some responsibility for the incident. As with any risk determination for a childcare license, the Department determined that the program clients were extremely vulnerable, increasing the risk of harm.[31]

[29] Minn. Stat. § 518B.01, subd. 2 (b).
[30] Ex. 10 at 3.
[31] *Compare* Ex. 10 at 3 *and* Exs. 8 and 9.

29. The Department had information concerning the Applicant's discharge from treatment for abuse of methamphetamines in 2005 and 2006, prior to the incident that triggered the disqualification.[32]

30. In its letter dated June 3, 2011, the Department denied the Applicant's request for reconsideration. It stated that the Applicant committed the following disqualifying acts:

> A preponderance of the evidence indicates that on March 21, 2007, you committed an act or acts that meets (sic) the definition of misdemeanor domestic assault pursuant to Minnesota Statutes, section 609.2242.
>
> On December 13, 2007, you were convicted of controlled substance crime in the fifth degree pursuant to Minnesota Statues, section 152.025. On January 5, 2010, your sentence was discharged and the level of the offense was deemed to be a misdemeanor.[33]

31. In its determination not to grant reconsideration, the Department found the following facts to be determinative:

- The serious nature of the disqualifying events, a controlled substance offense and an assault offense;
- The vulnerability of the persons served in the program;
- Two disqualifying offenses.[34]

32. For the same reasons, the Department refused to grant a variance.[35] Although a variance had been granted in 2007, in this instance, the Applicant would be working alone with young children.[36]

33. In its letter, the Department also stated that the disqualification for domestic assault was conclusive, citing Minn. Stat. § 245C.29, because the Applicant did not believe that the information relied upon was incorrect and "did not request a fair hearing" after being notified of the correctness of the disqualification in 2007.

34. At hearing, the Department also relied upon its perception that the Applicant had not been honest in her representations to the Department as a basis for denying reconsideration. This was of special concern to the Department. In particular, it found that the Applicant's inability to provide coherent information to the police on the evening of the incident was inconsistent with the detail supplied to the Department. Also, it claimed that, although the Applicant represented that she had completed

[32] Ex. 2 at 19-22.
[33] Ex. 10
[34] Ex. 10 at 2.
[35] Ex. 10 at 2.
[36] Test. of P. Sifferle.

treatment, she had failed to provide support to the Department.[37] This is inconsistent with the Department's acknowledgement that it had considered the attachments to Exhibit 2 in making its determination. The court documents show that the Applicant completed the treatment and monitoring conditions prescribed by the Court.[38]

35. The Applicant acknowledged that she had struggled with chemical abuse, completed treatment and relapsed prior to the time of the disqualifying offense. She has had no criminal charges or other problems with law enforcement since 2007. After her guilty plea to disorderly conduct, the Applicant was screened for chemical dependency treatment and it was determined that she was not in need of treatment.[39]

36. After the incident, the Applicant completed training as a licensed practical nurse and worked in that field for a period of time. Because of her history with drugs, she was enrolled in the drug monitoring program for health care professionals and subject to periodic urinalysis. On one occasion she tested positive for alcohol; other tests were negative. The Applicant has married and would like to start a family and provide childcare in her home.[40]

Support for the Applicant

37. Several letters of support were offered into the record.[41] The Applicant has provided childcare to many children over the years and their parents strongly endorsed her application. One of the letters was written by the Applicant's AA sponsor who has had the opportunity to observe many changes in the Applicant's life over seven years. She noted the Applicant's increased maturity, ability to handle stress, and support from her husband.[42] Another letter was written by a person who had been both a nursing supervisor and co-worker of the Applicant. She noted the Applicant's outstanding qualities: compassion, care and willingness to go the extra mile to care for others.[43]

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Department and the Administrative Law Judge have jurisdiction to consider this matter pursuant to Minn. Stat. §§ 14.50, 245A.08, subd. 2a, and 245C.28. The scope of the hearing includes the disqualification and the denial of the license.

2. The Applicant received proper and timely notice of the hearing and the Department complied with all procedural requirements of statute and rule.

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[37] Test. of P. Sifferle.
[38] *See also* Exs.21, 22.
[39] Ex. 2 at 17-18; Test. of M. Trost.
[40] Test. of M. Trost.
[41] Exs. 14-19.
[42] Ex. 16.
[43] Ex. 17.

3. Pursuant to Minn. Stat. § 245C.03, subd. 1, the commissioner of human services must conduct a background study on a person applying for a license.

4. Pursuant to Minn. Stat. § 245C.14, subd. 1, the commissioner shall disqualify a person from any position allowing direct contact with persons served in a licensed program if the person has been convicted, admitted to or entered an Alford Plea to one or more offenses enumerated in Minn. Stat. § 245C.15. A person may also be disqualified if there is information demonstrating by a preponderance of the evidence that the individual has committed a disqualifying offense.

5. Because the Applicant withdrew her prior request for reconsideration of the disqualification based on domestic assault, pursuant to Minn. Stat. § 245C,29, that determination is conclusive, and, pursuant to Minn. Stat. § 245C.15, subd. 4, subjects the Applicant to disqualification for seven years. However, the Department's determination was incorrect as a matter of law because there were insufficient facts upon which the Department could determine by a preponderance of the evidence that the offense involved a family or household member.

6. The Department also erred in its determination that the Applicant admitted to, or was convicted of, a drug offense. The Applicant entered an Alford Plea, which is not an admission, and the District Court did not enter a conviction into the record. Rather, the adjudication was stayed and ultimately dismissed. Pursuant to Minn. Stat. § 152.18, subd. 1, the dismissal may not be deemed a conviction for purposes of disqualification.

7. Prior to issuing a license, the commissioner shall "consider facts, conditions, or circumstances concerning the program's operation, the well-being of persons served by the program, available consumer evaluations of the program…."[44]

8. The commissioner shall also evaluate the results of the background study and determine whether there is a risk of harm to the persons served by the program.[45]

9. In determining the risk of harm, the commissioner shall apply the standards set forth in Minn. Stat. § 245C.22. Upon receiving a request for reconsideration, the commissioner may set aside the disqualification if the applicant has submitted sufficient information to demonstrate that she does not pose a risk of harm to any person served in the licensed program. The commissioner shall give preeminent weight to the safety of each person served by the applicant over the interests of the applicant.[46]

10. In determining whether the applicant has met the burden of proving that she does not pose a risk of harm, the commissioner shall consider:

[44] Minn. Stat. § 245A.04, subd. 6.
[45] Minn. Stat. § 245A.04, subd. 6.
[46] Minn. Stat. § 245C.22, subds. 3 and 4.

(1) the nature, severity, and consequences of the event or events that led to the disqualification;

(2) whether there is more than one disqualifying event;

(3) the age and vulnerability of the victim at the time of the event;

(4) the harm suffered by the victim;

(5) vulnerability of persons served by the program;

(6) the similarity between the victim and the persons served by the program;

(7) the time elapsed without a repeat of the same or similar event;

(8) documentation of successful completion by the individual studied of training or rehabilitation pertinent to the event;

(9) any other information relevant to reconsideration.[47]

11. The disqualification was the result of a single event that led to two criminal charges. It involved a fight between the Applicant and her former boyfriend, D.F. D.F. was a large adult male who was not vulnerable and sustained minor injuries. The Applicant also sustained injuries. The event occurred in 2007 and since that time, the Applicant has completed rehabilitation and probation, completed her education, held a job, married, and has not been involved in any same or similar events. Although the children served by the program are vulnerable, no children were involved in the 2007 incident.

12. The Applicant has demonstrated by a preponderance of the evidence that she does not present a risk of harm to the children in care and that her disqualification should be set aside.

13. There was no evidence that the County and Applicant completed the child care application process following notice of the disqualification.[48]

14. Any Findings of Fact more properly designated as Conclusions are hereby adopted as such.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum incorporated herein, the Administrative Law Judge makes the following:

[47] Minn. Stat. § 245C.22, subd. 4 (b).
[48] *See* Minn. Stat. § 245A.04.

RECOMMENDATION

The Administrative Law Judge recommends that the Applicant's disqualification be set aside and her application for a child care license proceed.

Dated: October 11, 2011

s/Beverly Jones Heydinger
Beverly Jones Heydinger
Administrative Law Judge

Reported: Digitally Recorded

NOTICE

This report is a recommendation, not a final decision. The Commissioner will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. The Commissioner then has 10 working days to issue his final decision. Parties should contact Lucinda Jesson, Commissioner of Human Services, PO Box 64998, St. Paul, MN 55164-0998, (651) 431-2907, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline or sanction to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The Applicant bears the burden of showing by a preponderance of the evidence that she meets the requirements for a childcare license. In this case, her application

was denied because of the results of her background check, prior to completion of the application process.

The Department bears the burden of proving by a preponderance of the evidence its basis to disqualify the individual. The disqualified person bears the burden of demonstrating that a disqualification should be set aside.

Domestic Assault Crime

Patricia Sifferle, the legal office supervisor for the Department's Licensing Division, testified that the Applicant was disqualified in 2007 because the Department concluded by a preponderance of the evidence that the Applicant committed a domestic assault. Ms. Sifferle stated that the determination concerning the domestic assault was "conclusive." In light of the Applicant's withdrawal of the reconsideration request, Ms. Sifferle is technically correct. However, because the Applicant's assault did not involve a family or household member as defined in Minn. Stat. § 518B.01, it was not and could not have been charged as a domestic assault, and the Department did not have a factual basis to conclude that domestic assault occurred by a preponderance of the evidence. This error is repeated throughout the record.

Controlled Substance Crime

The Department has mischaracterized the drug offense as either an "admission" or "conviction," when it was neither of the two. The Alford Plea is intended to assist in resolution of criminal matters when the defendant denies that she committed a crime, but acknowledges that there may be sufficient facts upon which she could be found guilty. Here, she accepted the plea in order to obtain the benefit of the Stay of Adjudication. It was a negotiated settlement, and as stated in the Order of the Court Discharging Probationer – Stay of Adjudication, is not to be construed as a conviction, nor is the Applicant to be subject to any sanction that would rest on a conviction.

As Minn. Stat. § 152.18 states:

> If during the period of the probation the person does not violate any of the conditions of the probation, then upon expiration of the period the court shall discharge the person and dismiss the proceedings against that person. Discharge and dismissal under this subdivision shall be without adjudication of guilt, but a not public record of it shall be retained by the Bureau of Criminal Apprehension for the purpose of use by the courts in determining the merits of subsequent proceedings against the person…. <u>The discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime or for any other purpose.</u>[49]

[49] Minn. Stat. § 152.18, subd. 1 (emphasis added). *See also,* Minn. Stat. § 245C.15, subd. 4 (f): "When a disqualification is based on a judicial determination other than a conviction, the disqualification period begins from the date of the court order. When a disqualification is based on an admission, the disqualification period begins from the date of an admission in court. When a disqualification is based on

The Department made no attempt to evaluate the facts to determine by a preponderance of the evidence that an offense occurred. Thus, it has failed to demonstrate that there is any basis for a second disqualifying offense.

Set Aside Determination

The Department had two primary reasons for not setting aside the disqualification: the seriousness of the incident and its perception that the Applicant's explanation of the events was not entirely credible because of differences between her statement to the police and her statement to the police.

Evaluation of these matters is inherently a judgment call, but the Department seems to have placed undue weight on the seriousness of the incident. The incident involved a fight between the Applicant and a former boyfriend, but the injuries and damage were minor. The police report corroborates the Applicant's statement that D.F. was much larger than she was: 10 inches taller and twice her weight.[50]

Although the Department discounted the Applicant's explanation of what occurred in her letter seeking reconsideration, it is not apparent why it did so. The Applicant's visit to the hospital and possible concussion were consistent with her claim that she was upset and confused the night of the incident and not able to rationally respond to the police.

The Applicant's claim that she attempted to take the drug pipe away from her boyfriend was no less credible than his claim that she threw her pipe at him because he would not give her drugs. Her accounting does not excuse her poor judgment when she chose to go to her former boyfriend's apartment very late at night to confront him and then fought with him. However, in total, the Department may have placed too much weight on the seriousness of the incident and what it perceived to be the Applicant's failure to provide consistent information.

At hearing, the Department took the position that the Applicant did not provide information that she had successfully completed treatment. Yet, the items presented to the Department include court records addressing her probation, and other documents included with her request for reconsideration. These items state that she completed drug treatment prior to the incident and, following the incident, an assessment concluded that no treatment was necessary. Also, while employed as a nurse, the Applicant was enrolled in a program for health care professionals that monitored drug and alcohol use. She had one positive test for alcohol and none for drugs during the period of enrollment.

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an Alford Plea, the disqualification period begins from the date the Alford Plea is entered in court. When a disqualification is based on a preponderance of evidence of a disqualifying act, the disqualification date begins from the date of the dismissal, the date of discharge of the sentence imposed for a conviction for a disqualifying crime of similar elements, or the date of the incident, whichever occurs last." Here, where there was no judicial determination or disqualification based on a preponderance of the evidence, there is no basis upon which to establish the period of disqualification.

[50] Ex. 5.

The Department assumed that the Applicant had relapsed the night of the incident because the police report stated that she appeared intoxicated. No drug or alcohol testing was done, and the police observation was consistent with a concussion.

Conclusion

Taken as a whole, the evidence shows an Applicant who made a mistake, has taken responsibility for her misconduct and poses no risk of harm. At hearing, the Applicant was open, credible and appropriately remorseful for what occurred in 2007. She would be willing to undergo an assessment to demonstrate that she is no longer at risk of abusing drugs or alcohol.[51] She understood at the time that she entered into the plea arrangement that successful completion of probation would remove the disqualifying offenses from her record.[52]

The Department's witness acknowledged that she does not meet with or interview persons seeking reconsideration but bases her determination upon the paperwork that is submitted. Also, the Department did not have the many letters of support that the Applicant introduced at hearing. The letters support the Applicant's statements that she has made positive changes in her life and has a sincere interest in caring for children.

In light of all of the circumstances, the Applicant's disqualification should be set aside and the license application process should proceed. It would be inappropriate to order the Applicant's license to issue until she has successfully completed the balance of the application process.

In the event that the Commissioner does not set aside the disqualification, it should be limited to the determination of domestic assault which, although clearly erroneous, may be deemed conclusive pursuant to Minn. Stat. § 245C.29.

Disqualification should be limited to seven years from the date of the incident. Minnesota Statute § 245C.15, subd. 4 (e), states that disqualification based on a preponderance of the evidence extends for seven years from date of dismissal, date of discharge of the sentence imposed for a disqualification with similar elements, or the date of the incident. In this case, there was no charge of domestic assault so it was not dismissed. The sentence imposed was for disorderly conduct, which does not have elements similar to domestic assault and is not a disqualifying offense. Thus, the date of the incident, March 21, 2007, is the date from which a disqualification should commence.

B.J.H.

[51] *See* Minn. R. 9502.0335, subp. 2 D(2009).
[52] *See* Ex. 20.